



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Colonel Leon K. Pfeiffer, USAF, Retired

File: B-236753

Date: February 24, 1992

DIGEST

A retired regular officer of the Air Force who accepted government civilian employment upon retirement received erroneous payments of retired pay in violation of dual compensation laws because of administrative errors by the Air Force Accounting and Finance Center. This debt may not be waived under 10 U.S.C. § 2774 since, under the circumstances, the officer reasonably could be expected to have recognized that he was being overpaid.

DECISION

Colonel Leon K. Pfeiffer, USAF (Retired), requests review of our Claims Group Settlement of February 27, 1989, denying his request for waiver under 10 U.S.C. § 2774 of overpayments of military retired pay made to him by the Air Force. The overpayments resulted from payments being made to him in excess of the dual compensation "pay cap" limit¹ imposed by 5 U.S.C. § 5532(c).

While our Claims Group did waive what it assumed to be pay cap overpayments of \$4,861.53 made to Colonel Pfeiffer between June and December 1985, it denied waiver for overpayments of \$26,277.41 thereafter because it found that he should have questioned these overpayments.

In connection with this request for review, the Air Force has recalculated the amount of overpayments made to Colonel Pfeiffer as of November 30, 1989, after deducting the amount previously waived by our Claims Group. The Air Force now calculates Colonel Pfeiffer's pay cap indebtedness to be \$39,883.65.

¹When the annual rate of basic salary for the civilian position plus the annual rate of military retired pay exceed the rate of basic pay then currently paid for level V of the Executive Schedule, retired pay must be reduced in accordance with 5 U.S.C. § 5532 (c) (2).

For the reasons stated below, we conclude that waiver of the \$26,277.41 overpayment that was the subject of the Claims Group action should not be granted. An additional \$13,606.24 which appears to have accrued following Colonel Pfeiffer's application for waiver to this Office, cannot be waived because Colonel Pfeiffer had actual knowledge of the erroneous nature of the payments made to him.

The facts giving rise to Colonel Pfeiffer's indebtedness are complicated and extend over many years. A detailed account of these facts is set forth in the Air Force administrative report and need not be repeated here. It is sufficient to note that Colonel Pfeiffer retired from active service with the Air Force on September 1, 1981. In October 1981 he was hired by the Office of the Secretary of Defense (OSD) as a consultant; reappointed in October 1982; and following a 3 month break in service, hired on August 15, 1983 as a permanent civilian employee.

With regard to the keeping of his pay records during the years in question, the Air Force reports that its Finance Center personnel consistently failed to take any pay cap deductions from Colonel Pfeiffer's pay; failed to adjust his pay cap due to changes in the pay scale; and overall continually failed to maintain Colonel Pfeiffer's retired pay account in accordance with its published procedures.

Overpayments occurred in the early period of Colonel Pfeiffer's OSD employment in the amount of \$16,465.08.² When the Air Force furnished its report to our Claims Group in 1988, in connection with Colonel Pfeiffer's request for waiver of his pay cap overpayments, it cited this overpayment as having arisen due to its failure to take deductions under the pay cap provisions of the dual compensation law. In partially denying Colonel Pfeiffer's request for waiver, our Claims Group relied on the fact that Colonel Pfeiffer had repaid most of this earlier "pay cap" overpayment to reach its conclusion that he should have been

²Of this amount, a total of \$14,135.47 was eventually collected from him by 1985. The remaining portion of his debt is now time-barred under 31 U.S.C. § 3712(d) and cannot be collected by the Air Force. On July 18, 1989, Colonel Pfeiffer applied for waiver of the \$14,135.47 amount collected from him stating that he was not advised of his right to request waiver when the debt was discovered in 1983. Failure of agency officials to advise a member of his right to apply for waiver, even when required by regulation, is not sufficient to overcome the statutory limitation in 10 U.S.C. § 2774(b)(2). See CW4 Jacob M. Fein, AUS (Ret.), B-197511, Apr. 7, 1980.

aware of the Air Force's failure to take pay cap deductions in subsequent years.

The Air Force now reports that the \$16,464.08 debt arose under the provisions of 5 U.S.C. § 5532(b) of the Dual Compensation Act, which is separate from subsection (c), the pay cap provision of that law. Additionally, as mentioned earlier, the Air Force now calculates the amount of Colonel Pfeiffer's pay cap indebtedness to be \$39,883.65, not \$26,277.41, as was reported to the Claims Group. But, this additional \$13,505.24 appears to have resulted between the time that Colonel Pfeiffer's waiver application was transmitted to this Office and November 1989 because the Air Force still did not deduct adequate amounts for current pay cap debts but only deducted for accrued pay cap indebtedness starting in August 1988.

The question is whether Colonel Pfeiffer should have been aware that he was receiving erroneous payments as a result of the Air Force's numerous mistakes. We conclude that he should have recognized that he was being overpaid.

Under 10 U.S.C. § 2774, the Comptroller General may waive collection of all or part of an erroneous payment if it would be against equity and good conscience and is not in the best interest of the United States. Section 2774(b) precludes waiver if there exists an indication of fault on the part of the member, or if application is received after the expiration of 3 years immediately following the date of discovery of the erroneous payment. Fault is determined by whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlement. See generally 4 C.F.R. Part 91.

Colonel Pfeiffer maintains that he had no knowledge of the "pay cap" limitation until sometime in early 1988. He states that he was not briefed on the pay cap aspects of the dual compensation laws when he retired and states that he was given an older version of the Air Force's retirement booklet which did not contain a reference to the "pay cap" limitation. Nevertheless, as explained below, we believe that a reasonable person of Colonel Pfeiffer's rank and experience should have known about the pay cap provision in the dual compensation laws and should have realized that his gross compensation exceeded the limits provided by those laws. Commander Loyd F. Galyean, USN (Retired), B-224900, Feb. 24, 1987.

Colonel Pfeiffer states that he became aware of the pay cap as he was filing his 1987 tax return in early 1988. At that time, he thought that his total compensation might be approaching the limit. He states that he assumed that there was no problem, however, because his pay stub reflected

installment debt repayments, suggesting to him that his account was being monitored. Concerning the fact that his gross income actually significantly exceeded the pay cap limit during each of the years in question, Colonel Pfeiffer states that it was his understanding that Survivor Benefit Plan and Veterans disability payments were not considered in determining military pay for dual compensation purposes and that cash bonuses and Thrift Savings payments were not considered in determining civilian salary for the same purposes. He states that his rough calculations showed his net income to be under the cap in 1988, when he became concerned about exceeding it.

We have thoroughly reviewed the record submitted by the Air Force in this case. It reflects that Colonel Pfeiffer completed repaying his first dual compensation indebtedness by July 1985, and from that point until August 1988 there were only two instances where his retired pay stubs reflected debt repayments: March 1986 for \$14 and March 1988 for \$18. Furthermore, changes in the amount of deductions on account of dual compensation (not considering the pay cap) were insignificant in amount and were predictable in nature (e.g., due to increase in VA compensation, pay increases, etc.). Therefore, during the period that the overpayments under consideration here were taking place, Colonel Pfeiffer's retired pay was relatively stable.

In an attempt to replicate the calculations Colonel Pfeiffer may have made in order to estimate his net military and civilian income after he became concerned about the possibility of exceeding the pay cap, we added his net military pay (including voluntary allotments) to his civilian salary for calendar year 1987. We excluded cash awards and payments to the Thrift Savings Plan (TSP) from civilian salary and arrived at a net salary of \$57,434 (\$62,264 gross - \$2,830 TSP - \$2,000 cash award). We added net military retired pay (\$15,960) to net civilian salary, giving Colonel Pfeiffer the benefit of all military deductions except voluntary allotments.³ (The figure we

³Actual legal requirements are more stringent. 5 U.S.C. § 5532(c) requires consideration of the "annual rate" (i.e., gross) of military and civilian compensation allocable on a biweekly pay period basis. There are some exceptions. By statute, the costs of SBP and veterans insurance are not considered if the member would incur out-of-pocket costs to participate in these programs. See 5 U.S.C. 5532(c)(2)(B); Lieutenant Colonel Robert C. McFarlane, USMC (Retired), 61 Comp. Gen. 221 (1982). Cash performance awards, which are authorized by statute apart from basic pay, may be excluded from consideration, but other items like TSP are not excluded from consideration. Captain Milton D. Beach,

used for gross civilian salary is derived from the YTD gross salary contained in Colonel Pfeiffer's civilian Leave and Earnings Statement (LES) for the pay period related to the final pay check issued in 1987.) The total income under this method of calculation was \$73,394, or \$894 in excess of the 1987 ceiling of \$72,500 (level V of the Executive Schedule). However, Air Force records show that the actual amount by which Colonel Pfeiffer's combined civilian and military pay exceeded the ceiling was approximately \$9,500.

Colonel Pfeiffer's estimating process would have suggested a much larger pay cap problem in 1986 had he looked at his maximum allowable compensation at that time. TSP had not been established in 1986 for Civil Service Retirement System employees such as Colonel Pfeiffer, so that element of possible confusion would have not have been a factor. Applying our net military pay methodology for estimating dual compensation income to Colonel Pfeiffer's calendar year 1986 income, his estimated civilian salary would have been \$56,298 (57,298 gross - \$1,000 cash award) and his estimated net military retired pay would have been \$16,148. The total would have been \$72,446, or \$3,746 in excess of the 1986 ceiling of \$68,700. However, as in calendar year 1987, the actual amount by which Colonel Pfeiffer's combined annual rate of basic pay exceeded the level V amount was much larger, amounting to approximately \$9,000.

Accordingly, applying Colonel Pfeiffer's methodology yields an excess payment of almost \$5,000 over a two year period, an amount significant enough to alert a retired commissioned officer of the necessity of verifying his retired pay entitlements, in our opinion.

Colonel Pfeiffer's situation is distinguishable from that of LTC Robert E. Fitzgerald, USA (Retired), B-238761, Mar. 1, 1991, a recent decision in which we granted waiver. There, as here, the member's debt arose because of numerous administrative errors made by government pay officials in calculating the required deductions under the dual compensation laws from the member's retired pay account. However, unlike LTC Fitzgerald, Colonel Pfeiffer's retired pay did not fluctuate constantly. Instead, he received the same net pay over extended periods of time, and as mentioned above, there were only two insignificant debt deductions between July 1985 and August 1988. While there were other routine changes in the amount deducted on account of dual compensation, such changes were minor in amount and predictable in nature. Even during the period from October

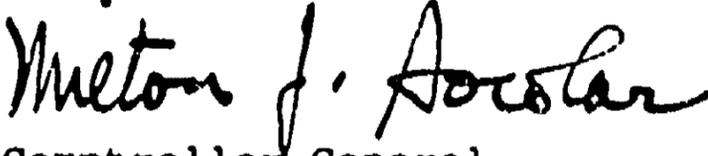
USN, Retired-Reconsideration, B-238189.2, July 26, 1991, 70 Comp. Gen. _____. Veterans compensation was excluded in deriving the reduction under 5 U.S.C. § 5532(b).

1983 through July 1985, when Colonel Pfeiffer was repaying his first dual compensation debt, the net amount received and the debt deducted (\$500) were relatively constant.

We recognize that dual compensation restrictions are a complex area of the law. See Admiral James D. Watkins, USN, (retired), B-235501, June 23, 1989. But the constancy in amount of Colonel Pfeiffer's net military pay between August 1985 and August 1988 should have allowed him to reasonably estimate whether he was substantially exceeding the pay cap. As to his contention that he was unaware of the pay cap restriction in the dual compensation laws until 1988, we are of the opinion that the earlier non pay cap dual compensation overpayments, which were in substantial amounts, should have put him on notice of his responsibility to determine what the applicable restrictions were and how they applied to him.

Finally, Colonel Pfeiffer points out that he asked the Finance Center in writing on six occasions how various changes in his pay would affect dual compensation. However, a review of copies of correspondence he sent to the Finance Center indicates that he was primarily concerned with the effect of Veterans compensation on dual compensation, and how both Veterans benefits and the dual compensation laws affected his taxable income. None of the letters involve a request by him for a thorough explanation of the application of the dual compensation laws or the pay cap feature of those laws.

The totality of all these circumstances leads us to conclude that Colonel Pfeiffer is not without fault in this matter, and therefore, the Claims Group's action concerning the overpayment of \$26,277.41 is sustained. Moreover, we cannot waive the additional \$13,606.24, which appears to have arisen after Colonel Pfeiffer's application for waiver, because he should have known that deductions then being made from his retired pay on account of dual compensation were not sufficient to cover current pay cap debts. Accordingly, no waiver would be proper in these circumstances.

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